Supreme Court, U.S.
FILED
JUL 31 2007
OFFICE OF THE CLERK

No. 07-07-352

IN THE

Supreme Court of the United States

CHARLES WILLIAMS,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
JAMES MCDONOUGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed DEC. 28, 2005]

NO. 04-60356-CIV-ALTONAGA/Bandstra

CHARLES WILLIAMS

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

ORDER GRANTING CERTIFICATE OF APPEALABILITY

THIS CAUSE came before the Court on Petitioner, Charles Williams' Application for a Certificate of Appealability [D.E. 26]. On March 22, 2004, Williams filed a Petition for Writ of Habeas Corpus on the grounds that he was deprived of his Sixth Amendment right to effective assistance of counsel [D.E. 1]. On November 22, 2005, the Court denied relief on the twelve claims raised in the Petition [D.E. 24]. Williams now moves the Court to issue a Certificate of Appealability with respect to one of his initial twelve claims: Claim IV, ineffective assistance of trial counsel based on counsel failing to move to redact Williams' pretrial, post-*Miranda*,[1] statement "I don't want to incriminate myself," from the admission that, "I've touched her. She's always teasing me, but . . . ." [See D.E. 24 at 25-30.] The Court has reviewed Petitioner's Application, the relevant portions of the record, and applicable law.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966)

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner contends that the Court's disposition of his fourth claim is fairly debatable. Specifically, he argues that the Court improperly relied on *United States v. Davis*, 512 U.S. 452 (1994) for the proposition that Williams' statement was not sufficient to invoke his *Miranda* right to remain silent. As the Court noted in its Order, *Davis* dealt with whether a suspect had invoked his right to counsel with sufficient clarity. Petitioner argues that while the right to counsel and the right to remain silent are parallel rights protected by *Miranda*, the standard for determining whether a suspect has invoked the right to remain silent should be less stringent than the standard for invoking the right to counsel established by *Davis*.

Petitioner also argues that the application of *Davis* to his statement allegedly invoking the right to remain silent contravenes Supreme Court precedent established by *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."), and *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that declining to speak is not admissible evidence), and Eleventh Circuit precedent established in *United States v. Johnson*, 558 F.2d

1225, 1228 (5th Cir. 1977)[2] ("Where a defendant's post-Miranda utterance is an ambiguous expression of his desire to remain silent, that utterance should receive the same treatment as naked silence.").

As explained in the Order, Petitioner's argument contradicts settled law in the Eleventh Circuit which has consistently applied the *Davis* standard to invocations of the right to remain silent. *See Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994) ("Because we are bound to follow the Supreme Court's holding in *Davis*, our decisions creating a duty to clarify a suspect's intent upon an equivocal invocation of counsel [including *United States v. Pena*, 897 F.2d 1075, 1081 (11th Cir.1990), which quoted *Johnson*, 558 F.2d at 1228] are no longer good law. Furthermore, we have already recognized that the same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel.") (citing *Martin v. Wainwright*, 770 F.2d 918, 924 (11th Cir.1985) ("We see no reason to apply a different rule to equivocal invocations of the right to cut off questioning."), modified on other grounds, 781 F.2d 185 (11th Cir. 1986)); *Medina v. Singletary*, 59 F.3d 1095, 1105 (11th Cir. 1995); *United States v. Mikell*, 102 F.3d 470, 477 (11th Cir. 1996).

Nonetheless, the applicability of *Davis* to the invocation of the right to remain silent has been questioned or reserved by some courts around the country. *See, e.g., Arnold v. Runnels*, 421 F.3d 859, 866 n. 8 (9th Cir. 2005); *United States v. Reid*, 211 F. Supp. 2d 366, 372 n.4 (D. Mass. 2002); *see generally* Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent*: A Post-Davis *Analysis and Proposal*, 29 Seton Hall L. Rev. 558 (1998). While the Court has been unable to identify any decision of a circuit court which addresses the

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

issue directly and rejects the approach adopted by the Eleventh Circuit, the existence of reasonable debate indicates that Petitioner's claim has "enough arguable merit . . . for reasonable jurists to debate." *Roberts v. Sutton*, 217 F.3d 1337, 1340 (11th Cir. 2000). Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's Application for a Certificate of Appealability [**D.E. 26**] is **GRANTED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of December, 2005.

/s/: Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Magistrate Judge Ted E. Bandstra
Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed NOV. 22, 2005]

CASE NO. 04-0356-CIV-ALTONAGA/Bandstra

CHARLES WILLIAMS,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

FINAL ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court on Petitioner, Charles Williams' ("Williams[']") Petition for Writ of Habeas Corpus [D.E. 1] filed on March 22, 2004, and United States Magistrate Judge Ted E. Bandstra's Report and Recommendation [D.E. 15] filed on April 25, 2005. Williams' Petition challenges his convictions and sentence imposed following a jury verdict of guilt in the Circuit Court of the Seventeenth Judicial District in and for Broward County, Florida. Magistrate Judge Bandstra's Report recommends that the Court deny Williams' Petition. Petitioner filed objections to the Magistrate Judge's Report [D.E. 16] on April 28, 2005, and Respondent, State of Florida ("State"), filed a reply to Petitioner's objections [D.E. 18] on June 10, 2005.

The Court has considered the written submissions, the record of Williams' state court proceedings, and applicable law. The Court also held oral argument on September 16, 2005. For the reasons that follow, the Magistrate Judge's

recommendations are affirmed and the Petition for Writ of Habeas Corpus is **DENIED**.

I. BACKGROUND

Williams was convicted by a jury of one count of sexual battery upon a child under twelve years of age (Count I), six counts of sexual battery on a person twelve years of age or older but less than eighteen years of age while standing in the position of familial or custodial authority (Counts II through VII), and six counts of indecent assault on a person under the age of sixteen (Counts VIII through XIII). On May 1, 1998, Williams was sentenced to life imprisonment without parole on Count I and fifty (50) years' imprisonment consecutive to Count I on Counts running concurrently with each other. On direct appeal, the Fourth District Court of Appeal affirmed the convictions and sentence. *Williams v. State*, 755 So. 2d 714 (Fla. 4th DCA 1999).

On June 26, 2000, Williams filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. On April 16, 2002, after two hearings before the trial court, the judge denied Williams' Rule 3.850 motion, but corrected his sentence on Count I.[1] On April 26, 2002, Williams moved for a rehearing of the order denying post conviction relief. The trial court held oral argument on Williams' motion for rehearing and found that although the jury in Williams' trial had not been properly sworn in accordance with Florida state procedure, Williams had failed to show any prejudice resulting from the error. Williams' appeal of the court's denial of the Rule 3.850 motion was affirmed in a *per curiam* decision issued on November 26, 2003. *Williams v. State*, 861 So. 2d 48 (Fla. 4th DCA 2003).

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[1] Williams' sentence on Count I was corrected to life imprisonment without eligibility for parole until twenty-five (25) years have passed.

During the pendency of his motion for post conviction relief, Williams filed a petition for writ of habeas corpus in the Fourth District Court of Appeal, arguing that he had received ineffective assistance of counsel on direct appeal of his conviction when his counsel failed to raise a *Trotter*[2] violation, which had been properly preserved. The Fourth District Court of Appeal denied the petition without opinion. Williams then filed a motion for certification and alternative motion to issue opinion explaining denial of the petition for writ of habeas corpus to permit Supreme Court review. On January 16, 2002, the Fourth District Court of Appeal denied these motions with a short opinion explaining that Williams' counsel on direct appeal had raised the issue concerning jurors challenged for cause. *Williams v. Moore*, No. 4D01-3399 (Fla. 4th DCA Jan. 16, 2002).

On March 22, 2004, Williams filed this Petition for Writ of Habeas Corpus relief seeking either a new trial or release from imprisonment on the grounds that he was deprived of his Sixth Amendment right to effective assistance of counsel. Williams claims that his trial counsel was ineffective for: 1) failing to specifically object to and move for a mistrial on the State's repeated presentation of other-crimes evidence; 2) failing to object to a "*Williams* Rule"[3] violation; 3) failing to

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[2] *Trotter v. State*, 576 So. 2d 691, 692 (Fla. 1990)("Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.").

[3] The "*Williams* Rule" refers to the Florida Supreme Court's holding in *Williams v. State*, 110 So.2d 654 (Fla. 1959), that evidence of other crimes, wrongs, or acts is admissible when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity. Similar in application to Fed.

object to the prosecutor improperly vouching for or bolstering testifying police officers' credibility during closing argument; 4) failing to seek redaction of Petitioner's post-*Miranda*[4] statement; 5) failing to ensure that voir dire of potential jurors was conducted under oath; 6) failing to properly perform at a preliminary hearing; 7) failing to impeach the victim-witness and/or arguing such impeachment during closing argument; 8) failing to move for judgment of acquittal; 9) failing to request a specific jury instruction; 10) failing to present testimony of a medical expert; and 11) failing to file certain motions (a motion to dismiss, motion for judgment of acquittal, and a motion attacking the verdicts on Counts VII and IX). Lastly, in Williams' twelfth claim, he contends that he received ineffective assistance of appellate counsel when his attorney failed to raise the properly preserved *Trotter* violation.

Respondent argues that Williams' first two claims do not constitute ineffective assistance of counsel, and that his remaining claims are procedurally barred either because they were not raised on appeal of the trial court's denial of the Rule 3.850 motion or because there is no basis for federal review. In his Report, Magistrate Judge Bandstra found that Williams did not receive ineffective assistance of counsel when his attorney did not object to "improper prosecutorial remarks about facts not in evidence" and the "*Williams* Rule violation." He declined to address the merits of Williams' third claim, that trial counsel failed to object to prosecutorial misconduct, and fourth claim, that trial counsel failed to move to redact Williams' post-*Miranda* statement, finding that the claims were procedurally barred. The Magistrate Judge dispensed with Williams' fifth claim for relief con-

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R. Evid. 404, the "*Williams* Rule" is a state evidentiary rule codified at Fla. Stat. § 90.404(2).

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

cerning his trial counsel's failure to object to an unsworn voir dire, finding that this state procedural defect provided no basis for federal review and, that on the merits, the defect did not satisfy either the deficiency or prejudice prong of the *Strickland*[5] standard for establishing ineffective assistance of counsel. Williams' sixth, seventh, eighth, ninth, tenth and eleventh claims were rejected because Magistrate Judge Bandstra found that Williams had not exhausted the remedies available to him in the Florida state courts.

Finally, the Magistrate Judge found that Williams' twelfth claim, that his appellate counsel was ineffective for failing to raise a perfected *Trotter* claim concerning prospective juror Nancy Caneda ("Caneda"), was raised and addressed by the court on direct appeal. After reviewing Williams' brief on direct appeal, the Magistrate Judge found that counsel "did address [Caneda] as one of the nine prospective jurors that [sic] should have been stricken." [Report at 12-13.] He reasoned that although counsel did not specifically raise, and the court did not directly consider, proof of bias with respect to Caneda, the court "expressly addressed burden of proof bias with respect to other prospective jurors" and did "address the denial of all nine challenges [including Caneda] for cause." [*Id.* at 12.] In addition, Magistrate Judge Bandstra found that because Williams had been granted two additional peremptory challenges, he failed to demonstrate any prejudice with respect to this claim.

The Court has reviewed the Petition and objections *de novo*. Williams' claims and his objections to the Report are addressed below.[6]

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[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

[6] Williams objects that the Magistrate Judge failed to address two due process claims pertaining to the prejudicial spill-over effect of uncharged crimes evidence, along with prosecutorial comment thereon, and improper summation by the prosecution in vouching for and misstating the proper

II. STANDARD OF REVIEW

"[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the federal habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[7]

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d).

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test for determining guilt. However, Williams' contention that he raises two due process claims, separate from and independent of his ineffective assistance of counsel claims, is not supported by his own Petition. The Petition only raises twelve claims, not fourteen. [Pet. for Writ of Habeas Corpus at 6A-6D.] Each of Williams' claims relates directly to the performance of his counsel, as evidenced by the fact that each claim commences with the assertion that "Defense counsel failed," "Defense counsel was ineffective," or "Appellate counsel rendered IAC." [*Id.*] The Magistrate Judge's Report properly disposes of all twelve claims as claims of ineffective assistance of counsel because that is exactly what the Petition presented.

[7] The AEDPA applies to Williams' Petition because the Petition was filed after the statute's effective date of April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 322 (1997).

"A general framework of substantial deference governs . . . review of every issue that the state courts have decided." *Diaz v. Sec'y for the Dep't of Corr.*, 402 F.3d 1136, 1141 (11th Cir. 2005). Furthermore,

> [t]he "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions. A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.
>
> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. Notably, an "unreasonable application" is an "objectively unreasonable" application.

Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001) (citations and footnote omitted).

"[C]learly established federal law 'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision.'" *Id.* (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A state court decision is not contrary to established Supreme Court precedent when the precedent "is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). Moreover, constitutional claims may not be raised on collateral review if they are based on a "new constitutional rule of criminal procedure that had not been announced at the time

the defendant's conviction became final. . . ." *Turner v. Crosby*, 339 F.3d 1247, 1282 (11th Cir. 2003) (citing *Teague v. Lane*, 489 U.S. 288, 310-13 (1989)). A "case announces a new rule when it breaks new ground or imposes a new obligation on the State or the Federal government [or] . . . if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original).

A court may not grant a petition for a writ of habeas corpus by a person in state custody unless it appears that "(A) the applicant has exhausted the remedies available in the courts of the State; or (B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). Nevertheless, a petition "may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." *Id.* at § 2254(b)(2).

When a claim has never been presented in state court, and "[i]t is clear that collateral relief would be unavailable to petitioner" in state court due to a procedural bar, the claim is considered exhausted for purposes of § 2254(b). *Teague*, 489 U.S. at 298. However, a petitioner is procedurally barred from raising such a claim in a federal habeas case "unless he can show cause for the default and prejudice resulting therefrom." *Id.*

Under the AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). *See also Crawford v. Head*, 311 F.3d 1288, 1295 (11th Cir. 2002); *Marquard v. Sec 'y for the Dep't. of*

Corr., 19 Fed. L. Weekly Cl, C8 (11th Cir., Nov. 10, 2005). Furthermore,

> [i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. § 2254(e)(2).

Nonetheless, if a petitioner "diligently sought, but was denied, the opportunity to present evidence at each stage of the state proceedings," he or she will not be deemed to have "failed to develop" the factual basis of the claim in state court proceedings. *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002). In such a case, "'a habeas petitioner is entitled to an evidentiary hearing if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief.'" *Id.* (quoting *Meeks v. Singletary*, 963 F.2d 316, 319 (11th Cir. 1992)). Pursuant to the AEDPA, this means that a petitioner must "demonstrate that his or her factual allegations, if proven, would indicate that the [state court] acted contrary to, or unreasonably applied, clearly established federal law when it rejected his . . . claim." *Id.* at 961. Petitioner here has not made a request for an evidentiary hearing.

III. ANALYSIS

Williams' claims seek relief on the basis of ineffective assistance of counsel. Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.[8] "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970).

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. . . . First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

With regard to the first *Strickland* element, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. In this regard, a court must decide "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. Moreover, "when examining a claim of ineffective assistance of counsel, . . . [the court] 'must indulge [the] strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment.'" *Callahan v. Campbell, Attorney General of Alabama*, 18 Fla. L. Weekly Fed. C1025, 1035 (11th Cir., Oct. 5, 2005) (quoting *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc).

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[8] The Sixth Amendment guarantee of counsel, which is "fundamental and essential to a fair trial," is made obligatory upon the states and incorporated by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

As to the second *Strickland* element, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Indeed, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Petitioner bears the burden of proof as to both the "deficient performance" and "prejudice" components of the *Strickland* standard. *Bell v. Cone*, 535 U.S. 685, 695 (2002).

Under the AEDPA, the Court may not consider whether Petitioner "would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance. . . ." *Bell*, 535 U.S. at 698-99. Rather, Williams "must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner," or that the state court decided this case differently than the Supreme Court on materially indistinguishable facts, and thus was "contrary to" the *Strickland* standard. *Id.* at 699.

A. Claims I & II

Williams argues that his counsel provided ineffective assistance by failing to object to "improper, prejudicial remarks about facts not in evidence, combined with a Williams rule violation when the state asserted uncharged and unnoticed crimes." [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 13.] At issue are the following statements made by the prosecutor during his opening statement: ". . . this literally happened about a hundred times, so many times the little girl stopped counting . . ." [T.R. at 150]; and ". . . [t]hirteen counts. You may ask yourself if it happened 100 times, why didn't you charge him 100 times? But that's what he is charged with. That's what you have to decide at the end of this trial." [T.R. at 151.] Williams contends that these comments were unsupported by evidence at trial and prej-

udicial to his defense. He objects to the Magistrate Judge's finding that counsel's failure to object was strategic, on the basis that "there could be no conceivable advantage to Defendant to allow unfounded accusations of 'hundreds' of uncharged similar crimes to go unchallenged." [Petr.'s Objection at 2.] The Court disagrees.

The Magistrate Judge correctly determined that the foregoing statements were not prejudicial to Williams because "the prosecutor's statements simply provided the jury with a summary of what they would hear during trial." [Report at 5.] As such "[s]tating that the abuse occurred about a hundred times during the prosecutor's opening statement was not a presentation of uncharged crimes but rather a figurative statement concerning the extent to which the abuse occurred." [*Id.*]; *see United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir. 2005) (rejecting a claim of prosecutorial misconduct in opening statements because "[t]he prosecutor's comments were not based on personal opinion but upon the evidence he expected to, and did in fact, present at trial.").

The prosecutor's allegedly objectionable characterization of the evidence was supported by the victim who testified repeatedly to the fact that she was abused more often than she could count:[9]

> Q: During that period of time, the seven years you were living in Charles [Williams]'s house, did he ever touch you in a sexual way?
>
> A: Yes, he did.

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[9] Williams attributes these statements to the prosecutor rather than the victim: "The prosecutor told the jury that the victim 'can't count' the number of times she had been molested" [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 14 (citing T.R. at 232-233.)]; and "[h]e also stated that it started at age 9 when the Information charged that it began at age 11." [Petr.'s Mem of Law Supp. Pet. for Writ of Habeas Corpus at 14 (citing T.R. at 239.)] Petitioner's own citations to the trial record, however, establish that these assertions were made in testimony by the victim, not in argument by the prosecutor.

Q: Do you think you can begin to count the number of times something like that happened?

Mr. Kulik [Defense Counsel]: Objection to the leading questions at this point. The Court: Overruled.

A: Not that I know of. I couldn't put a number to it.
Q: Did he ever have you touch him in a sexual way?
A: Yes.
Q: Was it more than once?
A: Yes.
Q: Again, could you begin to count the number of times?
A: No I can't. Sorry.
Q: How old do you think you were when he first started touching you?
A: Eight years old.

[T.R. at 232-233.]

Q: Do you have an estimated number of how many times [the skin on Defendant's mouth touched the skin of victim's vaginal area]?
A: All these things I can't put a number to them.
Q: You lost count?
A: Yes.

[T.R. at 238.]

Q: Do you know how many times he did that [digitally penetrated victim's vaginal area]?
A: No.
Q: More than once?
A: Yes.
Q: How old were you when you first remember him doing that?
A: Probably like nine or so.

[T.R. at 239.] In light of the testimony, the Magistrate Judge correctly concluded that defense counsel's decision not to

object to the prosecutor's opening statement did not prejudice the defense. Williams has not shown that, but for that decision, the result of the proceeding would have been different.

The Court is similarly persuaded that counsel's decision not to object to the prosecutor's opening statement was a strategic choice. As the Magistrate Judge noted, the Florida Supreme Court and the Eleventh Circuit Court of Appeals have held that a trial counsel's decision not to object is a tactical decision. *See Ferguson v. State*, 593 So. 2d 508, 511 (Fla. 1992); *Devier v. Zant*, 3 F.3d 1445, 1454 (11th Cir. 1993); *Mills v. Singletary*, 63 F.3d 999, 1028 n.50 (11th Cir. 1995) ("Assuming that the prosecutor's comments were somehow improper, we conclude [defense counsel's] strategic decision not to object more frequently than he did constituted a tactical decision that was well within the realm of reasonableness."). Matters that fall within the realm of strategic or tactical decisions will rarely, if ever, be the basis for a finding of ineffective assistance of counsel. *See Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1993); *Westbrook v. Zant*, 704 F.2d 1487, 1500 (11th Cir. 1983). "Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams*, 709 F.2d at 1445.

Despite Williams' protestations to the contrary, there is significant evidence in the record to demonstrate that counsel's decision not to object to the prosecutor's opening statement was based on trial strategy. In his closing argument, defense counsel stated to the jury that

> [t]he judge is going to instruct you a lack of evidence is grounds for a reasonable doubt. There is a lack of evidence about a lot of these counts because the state chose to do it that way. It was desperately done. Conflicts in the evidence are grounds for a reasonable doubt.

> I pointed out numerous conflicts. There are also conflicts between their testimony and the physical evidence between mother and daughter. In fact, this girl [the victim] in her exam has no signs of anything. That is inconsistent with these hundreds of allegations.

[T.R. at 441.]

Defense counsel's strategy may have been to try to use what he considered the prosecutor's hyperbolic opening statement against the State. Rather than being a choice that "no objectively competent lawyer would have taken," the strategy is a well recognized method of attacking the sufficiency of an adverse party's evidence. *See e.g.*, 5 Am. Jur. *Trials* 285 § 13 ("Counsel should exercise great care not to overstate his case in his [or her] opening statement nor to assert the existence of facts that he [or she] will be unable to prove. If counsel indulges in overstatement, his [or her] adversary may capitalize on it by asking the jury to hold counsel to any wild statements made in opening.").

Finally, Williams argues that the Court cannot make a finding that counsel's actions were strategic without holding an evidentiary hearing. He asserts that "[o]rdinarily, a finding of trial strategy without an evidentiary hearing is improper." [Petr.'s Objection at 2.] As a matter of law, Petitioner is incorrect. *See e.g.*, *Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (en banc) (concluding—without evidentiary hearing on whether counsel's strategy arose from his ignorance of law—that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to that taken by actual trial counsel), replacing vacated panel opinion, 813 F.2d 1082 (11th Cir.1987) (2-1 opinion) (remanding for evidentiary hearing on whether pursuit at trial of actual innocence defense was an informed strategic decision); *West v. Crosby*, 2005 WL 2333615, 2005 U.S. App. LEXIS 20955 (11th Cir. Sept. 23, 2005) (rejecting two claims of ineffective assistance

of counsel and holding that "the district court did not abuse its discretion in failing to hold an evidentiary hearing."). Moreover, Williams has not requested such a hearing.

Williams has failed to establish either that his counsel performed ineffectively in failing to object to the prosecutor's opening statement or that there is a reasonable probability of a different result if counsel had objected. Thus, the state court decision is neither contrary to, nor an unreasonable application of, clearly established federal law.

B. Claim III

In the third claim for relief, Williams argues that he received ineffective assistance when his attorney failed to object to, and move for a mistrial, based on two distinct aspects of the prosecutor's closing argument. Specifically, Williams contends that the prosecutor improperly asked the jury to use a "who was lying" test to decide Petitioner's guilt and improperly vouched for, or bolstered, the credibility of two testifying police officers. The Magistrate Judge found that these arguments were raised and rejected on direct appeal. The Report cites the Florida rule that "[c]laims which were raised and rejected on direct appeal cannot be relitigated on a Rule 3.850 motion, 'even if couched in ineffective assistance language.' [Report at 6, quoting *Asay v. State*, 769 So. 2d 974, 989 (Fla. 2000).]

Because the Magistrate Judge determined that the trial court had expressly found the claim to be barred on procedural grounds, and the Fourth District Court of Appeal affirmed that result without opinion, the Magistrate Judge concluded that the claim was barred from further review by the federal court:

> [A] state procedural default bars consideration of an issue on federal habeas corpus review when (1) the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a

> procedural bar, or (2) there is a clear and unambiguous application of a bar by the trial court, followed by a per curiam affirmance on appeal . *See Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038 (1989); *Ylst v. Nunnemaker*, 111 S .Ct. 2590, 2594 (1991); *Harmon v. Barton*, 894 F.2d 1268 (11th Cir. 1990).

[Report at 6-7.][10]

However, because the claim had been raised on direct appeal, it was fully exhausted rather than procedurally defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991) (observing that when a state decision "rests upon a prohibition against further state review—for example, an unexplained denial of state habeas resting in fact upon a rule . . . preventing the relitigation on state habeas of claims raised on direct appeal . . . its effect upon the availability of federal habeas is nil . . . ."); *Barclay v. Fla.*, 463 U.S. 939, 946 (1983) ("Since the Florida Supreme Court held that it had considered Barclay's claims in his first appeal, and simply refused to reconsider its previous decision in the second appeal, those claims are properly before us."). Therefore, Williams' third claim is considered on its merits.

In closing argument, the prosecutor stated:

> I guess what you have to decide—what any jury has to decide—is, well, who is lying? Why would this person have a motivation to come in and lie? What did she gain out of all this? All the witnesses that came in—because, obviously, if the witnesses are telling the truth, he's guilty. If they are lying, he's not guilty.

[T.R. at 415.] Petitioner contends that the prosecutor's argument was improper because it "asks the jury to determine

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[10] The Report cites *Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990) for the proposition that a state appellate court's *per curiam* affirmance of the trial court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts.

who was lying as the test for deciding if appellant was not guilty." *Northard v. State*, 675 So.2d 652, 653, *rev. denied*, 680 So.2d 424 (Fla. 1996). Petitioner argues that by failing to object to this line of argument, trial counsel failed to preserve the issue for appeal.

Additionally, Williams contends that his trial counsel rendered ineffective assistance by failing to object to the prosecutor's "improper vouching for or bolstering the credibility" of two police officers who testified at trial. In this regard, in closing argument, the prosecutor stated:

> We heard from Detective Murray about all the things he found. Would the defense contend he was lying? First of all, why would he lie? He's been a detective for 14 years. Business is booming. He certainly doesn't have to lie about anything. . . . What about Officer Ryerson? . . . Certainly Officer Ryerson isn't lying.

[T.R. at 416, 418.] Again, Petitioner claims that by failing to object to this portion of the prosecutor's closing argument, trial counsel forfeited a winning issue on appeal.

Williams initially litigated this ineffective assistance of counsel claim in his Rule 3.850 motion. In response, the State argued that the claim was procedurally barred because "Williams contended on appeal that these same portions of the prosecutor's closing argument constituted error." [Resp. to Def.'s Mot. for Post Conviction Relief at 17.] Because the issue had been raised on direct appeal, the State argued that Williams was precluded from relitigating the same issue as an ineffective assistance of counsel claim. The trial court denied Williams' claim, explicitly incorporating the reasons set forth in the State's response and the Fourth District Court of Appeal affirmed.

Beyond its implications for the issue of procedural bar which the Court has deemed inapplicable here, the state court's finding that Williams' counsel raised these issues on

direct appeal also erodes the underlying foundation of the ineffective assistance of counsel claim. If the issues were actually raised and considered on direct appeal, Williams cannot demonstrate any prejudice for failing to object and preserve the issues for appeal. Nevertheless, Williams contends that the state court's finding is incorrect for two reasons. First, he argues that the lack of contemporaneous objection barred the issues from consideration on appeal under Florida law. Second, he argues that while the issues actually raised on appeal related to the same portions of the prosecutor's closing argument quoted, they were not the same issues allegedly forfeited by trial counsel.

Under 28 U.S.C. § 2254(e), the state court's determination of factual issues, such as whether certain issues were raised on appeal, are presumed correct unless the Petitioner presents clear and convincing evidence that the court's finding was erroneous. Here, Williams bears the burden of demonstrating as erroneous the court's finding that his claims concerning improper argument in proposing an incorrect standard for determining guilt and bolstering of police officer-witnesses were raised on direct appeal. Petitioner's arguments, however, do not overcome the presumption in favor of the state court's finding that these issues were raised on direct appeal.

First, Williams incorrectly asserts that under Florida law, "[t]he failure to make timely objection defaulted the issue on appeal under black-letter law requiring contemporaneous objection." [Par.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 15.] Florida courts have held on numerous occasions, however, that "there are situations where the comments of the prosecutor so deeply implant seeds of prejudice or confusion that even in the absence of a timely objection at the trial level it becomes the responsibility of [the Florida Supreme Court] to point out the error and if necessary reverse the conviction." *Pait v. State*, 112 So.2d 380, 384 (Fla. 1959); *see also Ryan v. State*, 457 So.2d 1084 (Fla. 4th DCA 1984);

Knight v. State, 672 So.2d 590 (Fla. 4th DCA 1996); *DeFreitas v. State*, 701 So.2d 593 (Fla. 4th DCA 1997); *Brown v. State*, 787 So.2d 229 (Fla. 2d DCA 2001).

The case of *Freeman v. State*, 717 So.2d 105 (Fla. 5th DCA 1998) is instructive. In *Freeman*, a prisoner appealed his conviction on the basis of allegedly improper comments made by the prosecutor in closing argument. In particular, the prosecutor stated:

> "Who do you want to believe here? Do you want to believe the officers or do you want to believe Mr. Freeman? Ladies and gentlemen, I'm here to tell you that you should believe the officers. Why should you believe the officers? Simply because they're police officers, because they're sworn to uphold the law, because they're trained observers, because they have no reason to lie."

Id. at 105.

The court found that the bolstering of police witnesses was "clearly improper." *Id.* at 105-106. The court also found that "the prosecutor impermissibly shifted the burden of proof when he told the jurors that if they believed the police officers instead of Freeman, then they should find Freeman guilty and that 'the question' was who they wanted to believe." *Id.* at 106. The court noted that despite the fact that "no objection was raised to many of the comments about which Freeman complains, we must determine whether the comments were so prejudicial as to constitute fundamental error." *Id.* at 105. Even in the absence of objection, the court found that "[t]he prosecutor's comments during closing argument collectively rose to the level of being 'so prejudicial as to vitiate the entire trial,'" reversed the conviction and remanded the case for a new trial. *Id.* at 106.

Similarly, in *Lewis v. State*, 780 So.2d 125 (Fla. 3d DCA 2001) (en banc), the court found that the following comments

in the prosecutor's closing argument constituted improper bolstering: "'But does that mean that Detective Bernabe, Sergeant Everett, Detective Villaverde, and Howard Gazzo all conspired to walk into this courtroom and raise their right hand and commit perjury and lie under oath, jeopardize their careers, their families, place their livelihood on the line? For what?'" *Id.* at 130. The court reversed the conviction because the bolstering, in part, deprived Lewis of a fair trial. *Id.* at 131. Importantly, the court considered this argument (and other aspects of the prosecutor's closing argument) on appeal despite the fact that these portions of the prosecutor's closing argument did not draw an objection at trial. *Id.* at 129-130 ("None of the more egregious comments in this case were objected to below.").

Thus, if the prosecutor's remarks were as prejudicial as Williams contends, the lack of contemporaneous objection would not bar their consideration on appeal. Moreover, as stated, the same issues raised by Petitioner here were actually addressed by counsel and considered on direct appeal. In his brief on direct appeal, Williams' counsel argued that "[t]he trial court reversibly erred in allowing acts of prosecutorial misconduct to occur throughout the trial." [Initial Appeal of Appellant at 19.] In this section of the brief, Williams' counsel argued that the prosecutor

> made numerous illegal burden shifting arguments such as "if the witnesses are telling the truth he is guilty. If they are lying, he's not guilty[.]" Regarding Det. Murray he stated "Why would he lie. . . he doesn't have to lie about anything[.]" Such statements have been repeatedly proscribed by this court, and found to be reversible error even without an objection. [citing *Cisneros v. State*, 678 So.2d 888 (Fla. 4th DCA 1996); *Davis v. State*, 663 So.2d 1379 (Fla. 4th DCA 1995); *Clark v. State*, 632 So.2d 88 (Fla. 4th DCA 1994); *Sinclair v. State*, 717 So.2d 99 (Fla. 4th DCA 1998).] . . . When a prose-

> cutorial argument taken as a whole is of such a character that neither rebuke nor retraction may entirely destroy their sinister influence a new trial should be granted, regardless of the lack of objection or exception. [citing *DeFreitas*.] Where the totality of improper comments deprives the defendant of a fair trial, or materially contributes to a conviction, a new trial is required. [citing *Ford v. State*, 702 So.2d 279 (Fla. 4th DCA 1997).]

[Initial Appeal of Appellant at 19-20.] In its order on direct appeal, the Fourth District Court of Appeal held "[a]s to the other points raised on appeal [presumably including the arguments quoted above], we find Williams' arguments on same unpersuasive." *Williams*, 755 So.2d at 717.[11]

Petitioner contends that the arguments raised by counsel on direct appeal are distinct from the claims he argues were forfeited at trial. With respect to the "who is lying" statement, Williams argues that his attorney's appellate brief addresses the point as "an instance of improper 'burden shifting' rather than as an improper standard for determining guilt." [Petr.' s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 15 n.10.] Williams also contends that his counsel failed to raise the "bolstering" issue because "the Initial Brief at p.19 raises only the hearsay reliability argument concerning these statements under Fla. Stat. § 90.803(23). The bolstering issue was not mentioned at all as to Officer Ryerson; it was mentioned only with respect to the victim." [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 15 n.11 citing Initial Appeal of Appellant at 20.] Petitioner's arguments are not persuasive.

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[11] While the court's opinion does not explain its rationale for disposing of Williams' claims regarding the alleged improprieties in the prosecutor's closing argument, the court did not refuse to consider those claims because they had been waived by counsel by a lack of contemporaneous objection at trial.

First, it is not apparent that there is any meaningful distinction between the "improper burden shifting" argument raised on direct appeal and the ground Petitioner argues should have been raised, namely, that it was improper to invite the jury to determine who was lying as the test for deciding if he was not guilty. *See Northard*, 675 So.2d 652. In fact, Florida courts citing *Northard* have consistently characterized that holding as a prohibition against "burden shifting" arguments by the prosecution in closing. *See Gore v. State*, 719 So.2d 1197, 1200-1201 (Fla. 1998) ("it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt"); *Riggins v. State*, 757 So.2d 567, 569 (Fla. 2d DCA 2000)("[t]his statement made by the prosecutor distorted the state's burden of proof by shifting the burden to the accused," citing *Northard* for its "holding that prosecutor's argument was impermissible because it improperly asked the jury to determine who was lying as the test for deciding if appellant was not guilty"); *Rivera v. State*, 840 So.2d 284, 287-88 (Fla. 5th DCA 2003)("What each of these examples [including *Northard*] has in common . . . is the prosecutor's invitation to convict the defendant for a specific reason other than the state's proof of the elements of the crime beyond a reasonable doubt. . . . [T]he prosecutor's statement [in this case] was not a burden-shifting comment that is improper under the case law that has addressed this issue."); *see also Freeman*, 717 So.2d at 106 ("the prosecutor impermissibly shifted the burden of proof when he told the jurors that if they believed the police officers instead of Freeman, then they should find Freeman guilty and that 'the question' was who they wanted to believe."). It is evident that under Florida law, Williams' counsel raised the *Northard* ground in his direct appeal when he argued that the prosecutor "made numerous illegal burden shifting arguments such as 'if the witnesses are telling the truth he is guilty. If

they are lying, he's not guilty.'" [Initial Appeal of Appellant at 19-20.]

Petitioner's argument that his counsel did not raise the "improper bolstering" argument on direct appeal is equally unconvincing. The cases cited by Williams' counsel in the appellate brief stand for the proposition that certain prosecutorial statements in closing argument "constitute an inappropriate attempt to persuade the jury that the police officer's testimony should be believed simply because the witness is a police officer." *Cisneros*, 678 So.2d at 889; *see also Davis*, 663 So.2d at 1381 ("To argue that the police officers who testified had nothing to gain by lying on the witness stand because to perjure themselves would be to put 'their careers in jeopardy' constitutes an improper attempt by the state to enhance the credibility of its witnesses. It is an impermissible attempt to persuade the jury to believe the police officers solely because they are police officers."); *Clark*, 632 So.2d at 91("[T]he prosecutor's argument constitutes an inappropriate attempt to persuade the jury that the police officer's testimony should be believed simply because he or she is a police officer. . . . In no uncertain terms, the prosecutor's argument was that police officers would not testify falsely because they have too much at stake and would not risk their jobs.") (citations omitted), *overruled on other grounds, T.B. v. State*, 669 So.2d 1085 (Fla. 4th DCA 1996); *Sinclair*, 717 So.2d at 100 ("[t]his court has repeatedly condemned comments that the jury should believe a police officer because the officer would not put his or her career on the line by committing perjury."). Appellate counsel's numerous citations to authority support the state court's finding that the issue of improper bolstering of police officer's testimony was raised on appeal. Petitioner's argument that the bolstering issue was "mentioned only with respect to the victim," presumably because the word "bolster" appears only with respect to the discussion of the victim's testimony, is both unnecessarily

semantic and insufficient to overcome the presumption of validity afforded the factual findings of the state court.

Finally, while Williams' appellate brief did not address the prosecutor's comments about the testimony of Officer Ryerson, appellate counsel should not be faulted for failing to raise a frivolous argument. Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[F]ailure to raise nonmeritorious issues does not constitute ineffective assistance."). The prosecutor's statement, "[w]hat about Officer Ryerson? . . . [c]ertainly Officer Ryerson isn't lying" [T.R. at 418,] was not the equivalent to an argument "that because the witness was a police officer, [her] testimony is more believable than that of another, or that the officer would be putting [her] job on the line by testifying falsely." *Reyes v. State*, 700 So.2d 458, 460 (Fla. 4th DCA 1997) (holding that prosecutor's statements "'[a]s a result, we have to rely on honesty, integrity and good memory of the officers. . . . Ask yourself what kind of bad motive [sic] heard from Officer Aurigemma. Did he appear as though he was trying to deceive you? . . . Did it appear as though he was trying to lie?'" did not constitute improper bolstering.).

C. Claim IV

In his fourth claim for relief, Williams maintains that his trial counsel was ineffective for failing to move to redact Williams' pretrial, post-*Miranda*, statement "I don't want to incriminate myself," from the admission that "I've touched her. She's always teasing me, but . . . ." The statement was introduced three times during the trial. In opening statements, the prosecutor related to the jury that Williams had told Detective Murray "[w]ell, you know what, yeah, I touched her, but she's always teasing me. I don't want to say anything else that will incriminate me." [T.R. at 164.] Williams' trial counsel objected and moved for a mistrial arguing that the prosecutor had commented on Williams' invocation of his right to remain silent. [*Id.*] The court denied the objection, but

cautioned the prosecutor to "[s]tay away from saying, 'He didn't say anything.'" [T.R. at 165.]

Next, during his direct examination, Detective Murray testified that Williams was arrested and advised of his Constitutional rights. [T.R. at 303-307.] Detective Murray also testified that Williams stated "I've touched her. She's always teasing me, but I don't want to incriminate myself." [T.R. at 307.] Williams' counsel objected to the introduction of the statement and moved for a mistrial. [T.R. at 307-309.] The court again overruled the objection and denied the motion for mistrial, observing "[h]onestly, from what I'm getting from this, it is an answer to the question after *Miranda*. So it is appropriate. It is part of a confession." [T.R. at 308.]

Detective Murray stated that Williams' answer was "one continuous statement" and that he considered that statement to be an invocation of Williams' *Miranda* rights. [T.R. at 310.] Finally, during closing arguments, the prosecutor argued to the jury that Williams stated "[y]es, I touched her, but I am not saying anything else. I don't want to implicate myself." [T.R. at 421.] Williams' counsel again objected and the court overruled the objection. [*Id.*]

On direct appeal, Williams' counsel argued that the trial court erred by repeatedly allowing comments on the Defendant's right to remain silent. [Initial Appeal of Appellant at 17-18.] The Fourth District Court of Appeal rejected this argument as "unpersuasive." *Williams*, 755 So.2d at 717. In his Rule 3.850 motion, Williams advanced the argument that his trial counsel had been ineffective for failing to seek redaction of the second half of his statement to Detective Murray. [Mot. for Post Conviction Relief at 16.] In response, the State argued that this claim was procedurally barred because Williams' counsel had objected to the admission of the statements, moved for a mistrial and raised the point on appeal. [Resp. to Def.'s Mot. for Post Conviction Relief at 19-20.] Because the issue had been raised on direct appeal,

the State argued that Williams was precluded from relitigating the same issue as an ineffective assistance of counsel claim. The trial court denied Williams' claim, explicitly incorporating the reasons set forth in the State's response, and the denial was affirmed.

The Magistrate Judge combined his analysis of Petitioner's third claim with this claim and ruled that the latter was similarly subject to procedural bar. Williams objects, arguing that his "redaction" claim was not specifically raised or considered on direct appeal. While Petitioner's objection is technically correct, the gravamen of his present claim, that the statement allegedly invoking his right to remain silent was improperly admitted into evidence, was raised and considered by the court on direct appeal.

Consistent with the disposition of Williams' third claim, however, a procedural bar does not apply to this claim. It is evident that Petitioner's objection to the introduction of his post-*Miranda* statement was not defaulted. To the contrary, Petitioner's claim was properly exhausted before the Florida state courts and is ripe for review here.

Williams argues that his trial counsel rendered ineffective assistance for failing to seek redaction of the statement "I don't want to incriminate myself," from the admission "I touched her/she is always teasing me." He asserts that had his trial counsel moved to redact the statement, "the motion would have been granted and the prejudicial effect of his statement would have been eliminated or mitigated." [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 16.] The trial court, however, overruled three separate objections to the admissibility of Williams' statement. The court also affirmatively expressed an opinion that Williams' entire statement was an appropriate post-*Miranda* confession. In light of the record, the Court does not find a reasonable probability that upon a motion by Williams' counsel to redact the statement, the trial court would have changed its assessment

of the statement and granted the motion. More likely, any further objection by Williams' counsel to the admissibility of the statement would have been overruled and was, as a result, unnecessary. *See Biggs v. United States*, 3 Fed. Appx. 445, 449 (6th Cir. 2001) ("counsel could not have been ineffective in failing to raise a futile objection.").

Moreover, the affirmance of the decision to admit Williams' entire statement was not contrary to, nor a clearly unreasonable application of, Supreme Court precedent. In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Court observed that "while . . . *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Since *Doyle*, the Supreme Court has repeatedly reaffirmed its holding that "*Miranda* warnings contain an implied promise, rooted in the Constitution, that silence will carry no penalty." *Wainwright v. Greenfield*, 474 U.S. 284, 290 (1986); *see also South Dakota v. Neville*, 459 U.S. 553, 565 (1983) (*Doyle* recognized that the delivery of *Miranda* warnings "implicitly assures the suspect that his silence will not be used against him"); *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) ("The 'implicit assurance' upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*.").

The admissibility of Williams' statement depends on whether or not it is a comment on post-*Miranda* silence precluded by *Doyle* and its progeny. The fact that Williams allegedly invoked his rights by making a statement ("I don't want to incriminate myself") rather than by simply remaining silent does not automatically remove this case from *Doyle* analysis. *See Greenfield*, 474 U.S. at 295 n.13 ("With respect to post-*Miranda* warnings 'silence,' . . . silence does not

mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.").

To apply *Doyle*, then, the Court must determine whether Williams' statement was, in fact, a statement of his desire to invoke his *Miranda* right to remain silent. In *Davis v. United States*, 512 U.S. 452 (1994), a case dealing with the parallel right to counsel, the Supreme Court held that a defendant must invoke the right to counsel with sufficient clarity so that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney. "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-462. Whether a "suspect *might* be invoking the right to counsel" or the "'*likelihood* that a suspect would wish counsel'" are not appropriate tests to determine whether the right to counsel was actually invoked. *Id.* at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

Although the Supreme Court has not extended this analysis to invocations of the right to remain silent, the Eleventh Circuit has explicitly held that *Davis* applies with equal force in such cases. *See Coleman v. Singletary*, 30 F.3d 1420, 1423 (11th Cir. 1994) (holding that suspect's statement "'I don't know. But if he [the public defender] said to stop it, I don't want to do what he said not to do'" during interrogation was not an unequivocal invocation of the right to remain silent); *Medina v. Singletary*, 59 F.3d 1095, 1105 (11th Cir. 1995) (holding that when asked whether he wanted to speak to the police, suspect's answer "No" "was ambiguous and did not clearly indicate his desire to remain silent"); *United States v. Mikell*, 102 F.3d 470, 477 (11th Cir. 1996) (holding that "a suspect's refusal to answer certain questions is not tant-amount to the invocation . . . of the constitutional right to remain silent."). When measured against the *Davis* standard,

Williams' statement "I don't want to incriminate myself" was not an unambiguous and unequivocal invocation of the right to remain silent.[12]

Although Petitioner contends that his statement is severable, it may be read as a continuous sentence. One possible reading of the second half of Williams' statement is that "I don't want to incriminate myself" was offered as an explanation of the first half of his statement—that his touching of the victim was innocent or excusable. This reading suggests that Williams' entire statement was an admission and not an invocation of rights. Accordingly, the absence of a clear and unambiguous invocation of Williams' right to remain silent compels the Court's finding that the state court's disposition of Williams' *Miranda* claim was neither contrary to, nor an unreasonable application of, the *Davis* standard.

D. Claim V

Magistrate Judge Bandstra rejected Petitioner's fifth claim, based on Williams' trial counsel's alleged failure to ensure that voir dire of the jury panel was conducted under oath as required by Fla. R. Crim. P. 3.3000(a), "because there is no constitutional issue involved in this claim as it deals solely with the trial court's error to follow a state rule of criminal procedure." [Report at 8.] In addition, the Magistrate Judge expressed an opinion that, on the merits of the claim, Petitioner could not meet the burden of proving ineffective assistance of counsel for lack of resulting prejudice. [Report at 8-9.] The undersigned concurs with the Magistrate Judge's analysis, to which no objection has been raised.

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[12] That Detective Murray subjectively considered the statement at issue to be an invocation of *Miranda* [*see* T.R. at 310] is not determinative of whether the statement was a legally sufficient invocation. *See Medina*, 59 F.3d at 1101 ("The inquiry as to whether a suspect's invocation of his right to remain silent was ambiguous or equivocal is an objective one.").

E. Claims VI-XI

The Magistrate Judge concluded that Williams' sixth, seventh, eighth, ninth, tenth and eleventh claims were not raised on appeal of the trial court's denial of Williams' Rule 3.850 motion. [Report at 9-10.] In doing so, the Magistrate Judge determined that the reference in Williams' Rule 3.850 appeal to "Other Issues Not Argued Here Are Preserved" was insufficient to exhaust these claims for purposes of federal habeas review. [Report at 10.] Because he found that Petitioner had not exhausted the remedies available to him in the state courts with respect to these claims, the Magistrate Judge did not consider them on their merits. [Report at 10-11.] The undersigned concurs with the assessment that these claims were not properly exhausted.

F. Claim XII

In his final claim, Williams contends that he received ineffective assistance when his counsel failed to raise a properly preserved *Trotter* violation on direct appeal. The exchange giving rise to the underlying *Trotter* claim occurred during voir dire when counsel asked a prospective juror, Nancy Caneda, "You would want me to present evidence?" [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 10 n.8 (quoting T.R. at 94.)] In response, Caneda replied, "Yes, I would like it . . . ." [*Id.*]

During jury selection, Williams' counsel moved to strike Caneda for cause, observing that "[i]n response to my questions, she is the one that brought up the fact if the defendant didn't testify, she would think about that in her experience. She knows a juror who acquitted someone on a sexual battery case and later found out he had nine other offenses. I submit that the entire sequence of responses goes to reasonable fairness." [T.R. at 121.] The court denied this challenge for cause without explanation. [*Id.*]

Williams' counsel then used a peremptory challenge to remove Caneda from the jury. [T.R. at 122.] He objected to having to use a peremptory challenge to strike Caneda from the panel. [*Id.*] When Williams' counsel exhausted all of his peremptory challenges, he requested an additional challenge from the court. [T.R. at 129.] The court granted Williams' counsel two additional peremptory challenges over the prosecutor's objection.[13] [*Id.*]

After exhausting these additional peremptory challenges, Williams' counsel requested additional challenges, explaining that he "object[ed] to the court denying my cause challenges for each juror I had to strike peremptorily." [T.R. at 131.] He stated on the record that "[i]f the court would grant me an additional peremptory, I would strike Mr. McCoy." [*Id.*] The court denied the request for additional peremptory challenges, and Mr. McCoy was seated on the jury that eventually convicted Williams. [*Id.*] Petitioner contends that this record demonstrates that Williams' counsel did everything necessary to preserve the *Trotter* violation for appeal.

Williams' brief on direct appeal argued that "the trial court reversibly erred by failing to allow cause strikes against jurors who gave equivocal responses to questions about their ability to be fair and impartial, where the defense was denied additional peremptories and identified the jurors he would have stricken had more peremptories been granted." [Initial Appeal of Appellant at 12-13.] Williams explained that of the twelve jurors whom he sought to strike for cause, the judge only granted three cause strikes. [Initial Appeal of Appellant at 2-3.] Williams' brief then elaborated on his justification for

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[13] The Fourth District Court of Appeal determined that Williams had, in fact, been granted three additional peremptory challenges because he was permitted to strike one juror as an alternate after he had exhausted the additional peremptories granted by the court. *Williams*, 755 So. 2d at 715 n.1.

each of the nine cause challenges that the court had denied. With respect to Caneda,

> Appellant argued that Ms. Caneda could not be fair due to her response stating that she had a friend that [sic] was a juror in a rape case where the person went free and later the juror found out the jury made the wrong decision. [citing T.R. at 97.] She stated how badly the juror felt and suffered when they found out the defendant they set free was guilty. [citing T.R. at 96.] She stated that she would consider her friend's experience in deciding Appellant's verdict. [citing T.R. at 94-98.]

[Initial Appeal of Appellant at 3.] These references constitute the only discussion of Caneda in Williams' initial appellate brief.

In its decision, the Fourth District Court of Appeal addressed the question of "whether the trial court erred in not allowing Williams to strike two jurors for cause." *Williams*, 755 So.2d at 715. The court found that:

> Our review of the transcript supports that the answers by Mr. Hansen and Ms. Van Hyning presented a *Huber*[14] problem. Their responses suggest that they did not understand the respective burdens of proof involved in a criminal case, and continually evaded the question as to whether they could be fair and impartial if Williams did not put on a defense. Accordingly, we hold that they

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[14] *Huber v. State*, 669 So.2d 1079, 1082 (Fla. 4th DCA 1996) ("Even though the prospective juror . . . eventually said he would be able to follow the law and require the state to prove its case beyond a reasonable doubt, his original expression of doubt about his ability to presume the defendant innocent because he believes that police don't arrest innocent people is a basis for reasonable doubt that he might not be able to render an impartial verdict. This was not overcome by his subsequent capitulation and agreement that he would follow the law as given to him by the trial court, and it was error not to dismiss . . . [the juror] for cause.").

> should have been stricken for cause. *No error is presented, however, in the trial court's denial of the other seven challenges for cause.*

Williams, 755 So.2d at 716 (emphasis added). Although the court found that the trial court had erred by not striking prospective jurors Hansen and Van Hyning, it ruled that Williams could not demonstrate any prejudice from the error because the trial court had granted him two additional peremptory strikes to remove these panel members. *Id.* at 716-717. The court's opinion does not specifically address the denial of the cause challenge with respect to Caneda.

Williams argues that his appellate counsel was ineffective for failing to raise the trial court's error in denying a cause challenge with respect to Caneda based on her misunderstanding of the respective burdens of proof involved in a criminal case. Had this particular issue been raised on direct appeal, Petitioner contends that Florida law would have compelled the appellate court to find "manifest error," reverse Williams' conviction, and order a new trial. [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 6.][15]

This claim was initially raised in a petition for writ of habeas corpus filed in the Fourth District Court of Appeal on August 21, 2001. The court denied the petition without written opinion. [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 8.] Williams then requested that the court issue an opinion explaining its denial of his petition or, in the alternative, certify the following question to the Florida

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[15] Petitioner is not claiming a direct violation of federal law with respect to jury composition. *See Van Poyck v. Fla. Dep't. of Corr.*, 290 F.3d 1318, 1327 n.10 (11th Cir. 2002) ("We recognize that federal law does not require reversal where a defendant is forced to use a peremptory challenge on a juror who should have been dismissed for cause. [Citing *Ross v. Oklahoma*, 487 U.S. 81 (1988)).] . . . Instead, Petitioner is raising an ineffective assistance claim and arguing that he was prejudiced by his appellate lawyer's failure to assert properly a valid state-law claim.").

Supreme Court: "Whether in the circumstances of this case, Petitioner presented a meritorious claim of a *Trotter* violation, and if so, whether failure to raise the *Trotter* violation on direct appeal amounted to a violation of the sixth amendment right to the effective assistance of appellate counsel." [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 8.]

On January 16, 2002, the Fourth District Court of Appeal ordered

> that petitioner's motion filed December 5, 2001, for certification and alternative motion to issue opinion explaining denial of petition for writ of habeas corpus to permit Supreme Court review is denied. The issue of the court's error in failing to grant challenge for cause on the jurors was raised in the initial appeal. See initial brief, page 12. This included juror Canella [sic], as the court was asked to review all the jurors challenged for cause.

Williams v. Moore, No. 4D01-3399 (Fla. 4th DCA Jan. 16, 2002).

The Magistrate Judge concurred with the appellate court's finding that Williams' claim with respect to Caneda had been raised by counsel and had been addressed by the court on direct appeal. The Magistrate Judge observed that Williams' appellate counsel addressed Caneda as one of the nine prospective jurors who should have been stricken for cause. [Report at 12-13.] He found that even though William's appellate counsel did not specifically raise the "proof of bias issue" with respect to Caneda, the court "expressly addressed burden of proof bias with respect to other prospective jurors" and the court did "address the denial of all nine challenges [including Caneda] for cause." [*Id.* at 12.] In addition, the Magistrate Judge found that because Williams had been granted two additional peremptory challenges, he failed to demonstrate any prejudice with respect to this claim.

Under 28 U.S.C. § 2254(e), the state court's determination of factual issues, such as whether certain matters were raised on appeal, is presumed correct unless the Petitioner presents clear and convincing evidence that those were erroneous. Here, Williams has met his burden. It was clearly erroneous for the Fourth District Court of Appeal to find that Williams' appellate counsel had raised the issue of error in the trial court's decision not to strike Caneda for cause based on her misunderstanding of the respective burdens of proof involved in a criminal case.

"[F]or an issue to be raised, it must be explicitly stated and argued in the brief." Fla. R. App. P. 9.210(b)(1),(5); *Singer v. Borbua*, 497 So. 2d 279, 281 (Fla. 3d DCA 1986) (in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal). Here, in contrast to the objection at trial [T.R. at 121] in which counsel stated that he objected to juror Caneda on two grounds—that she would hold it against the defendant if he did not testify and that she knew a juror who had acquitted someone on a sexual battery case and later found out he had nine other offense—counsel on appeal only argued that the trial erred by denying a challenge for cause on the basis of Caneda's friendship with a juror who regretted her verdict in a different case. As Petitioner explains "[t]he difference between the two aspects of Caneda's qualifications is like night and day." [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 10.] That the court only applied the *Huber* standard to the voir dire responses of prospective jurors Hansen and Van Hyning indicates that the court understood that the objections applied only to those two jurors. It is apparent that had Williams' counsel argued on appeal that Caneda should have been stricken for cause because she would consider the fact that "the defendant didn't testify," the appellate court would have applied the *Huber* standard to her voir dire responses as it did to the responses of Hansen and Van Hyning.

Because Williams' appellate counsel did not raise the underlying claim that Petitioner argues here, the issue is whether this failure deprived Petitioner of his right to the effective assistance of appellate counsel. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). This claim is properly evaluated under the *Strickland* standard. *See Smith v. Murray*, 477 U.S. 527, 535-536 (1986) (applying *Strickland* to claim of attorney error on appeal); *Orazio v. Dugger*, 876 F2d. 1508, 1513 (11th Cir. 1989).

In describing the burden that Petitioner must satisfy to demonstrate prejudice[16] from appellate counsel's failure, the Eleventh Circuit has stated that

> the court must first perform a "review of the merits of the [omitted or poorly presented] claim." . . . If the [c]ourt finds that the neglected claim would have a reasonable probability of success on appeal . . . it is necessary to find "appellate counsel's performance prejudicial because it affected the outcome of the appeal."

Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991) (quoting *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)). Therefore the Court reviews the merits of the omitted argument to determine whether that argument would have had a reasonable probability of success on appeal.

Petitioner met the *Trotter* standard for preserving his objection to the denial of Williams' cause challenge with respect to Caneda. Accordingly, because the issue would have been properly preserved for appellate review, the Court

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[16] If Petitioner fails to demonstrate that he was prejudiced by the performance of his appellate counsel, the Court need not address whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697; *Lusk v. Dugger*, 890 F.2d 332, 336 (11th Cir. 1989).

considers whether the trial court erred in denying a cause challenge with respect to Caneda.

Florida law provides that a juror may be challenged for cause if:

> [t]he juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence.

Fla. Stat. § 913.03(10). The Florida Supreme Court has explained that the test for determining juror competency under this section is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *See Lusk v. State*, 446 So.2d 1038, 1041 (Fla. 1984) (citation omitted). The court must excuse a juror for cause f any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995).

"[T]he trial court has broad discretion in determining whether to grant or deny a challenge for cause based on juror incompetency, and the decision will not be overturned on appeal absent manifest error." *Overton v. State*, 801 So.2d 877, 890 (Fla. 2001) (citations omitted); *see also Gore*, 706 So.2d at 1332 (holding that the decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision). This substantial deference to the trial court's decision is an often insurmountable bar to claims such as Petitioner's. *See Busby v. State*, 894 So.2d 88, 100 (Fla.

2004) (observing that "[i]n four of the five cases in which the issue was deemed preserved for review [under *Trotter*,] this Court determined that the trial court did not err in denying the for-cause challenge."). The Florida Supreme Court grants the trial judge significant discretion in reviewing challenges for cause because it has recognized that "the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." *Smith v. State*, 699 So.2d 629, 635-36 (Fla. 1997).

Williams asserts that Caneda's disqualification was clearly demonstrated by a single question and answer in voir dire colloquy: "Kulik [Defense Counsel] asked her, 'You would want me to present evidence?' Caneda stated, 'Yes, I would like it . . .'" [Petr.'s Mem. of Law Supp. Pet. for Writ of Habeas Corpus at 10 n.8 (quoting T.R. at 94.)] Petitioner's selective quotation does not provide the context of Caneda's answer, and in fact, does not even reveal her entire answer to the quoted question. It is not appropriate to determine Caneda's competence and find that she misunderstood the burden of proof on the basis of the limited excerpt quoted by Petitioner.

Under Florida law, "[i]n evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." *Parker v. State*, 641 So.2d 369, 373 (Fla. 1994). The rationale behind this admonition to evaluate the totality of the voir dire colloquy stems from the understanding that "courts must be diligent in distinguishing between those responses merely reflecting some understandable confusion with the intricacies of the criminal law, and those responses which equivocally cast doubt as to that juror's ability to render an impartial and unbiase decision." *Van Poyck v. Singletary*, 715 So.2d 930, 935-936 (Fla. 1998) (Anstead, J., concurring i part and dissenting in part).

The record indicates that the following exchange occurred while Williams' counsel was probing the jury panel's understanding of the burden of proof during voir dire:

> Mr. Kulik [Defense Counsel]: . . . For anyone to hold it against me that I didn't present any evidence or didn't call Charlie as a witness, you can see it would be attributing some burden of proof to us, but Charlie has no burden of proof in the case. We don't have to present any evidence. He doesn't have to testify. You can't hold it against us. Does everyone understand why it is that way? . . . Is that fair? . . . Ms. Caneda, how about you?
>
> Ms. Caneda: I have to ask you why you just said to us about not putting him on.
>
> Mr. Kulik: You would want me to present evidence?
>
> Ms. Caneda: Yes, I would like it, not that it is to be done. I would like to weigh the scale of justice.
>
> Mr. Kulik: Of course you would. Does everyone agree you would like it and it would be nice? If the judge instructs you that is not the law; it is illegal consideration—
>
> Ms. Caneda: —I know it is.
>
> Mr. Kulik: Let's say you are back in the jury room. The State presents their entire case, but you think it is not enough evidence. You believe it is not proof beyond a reasonable doubt. I stand up and say, "I rest." If that's all they got, you go back in the jury room and one other juror says to you "If that guy didn't do it, he would have gotten up on the witness stand and said so. I wanted him up there so I can see his face," what would you do if some juror said that to you?
>
> Ms. Caneda: That has nothing to do with it because the gentleman didn't want to speak.

Mr. Kulik: What would you say to such a juror? Do you think jurors do that sometimes?

Ms. Caneda: Absolutely.

Mr. Kulik: We know it is completely illegal. So I am asking you, if you are a juror on the case and you are confronted, I am wondering what you are going to say.

Ms. Caneda: He has the right to do that, but we have to take the evidence and use that as the reason to make it guilty or not guilty. It has nothing to do with him talking.

Mr. Kulik: The judge instructs you that you are to make your decision based on the evidence in the case. That's what you do. What about what is not in evidence?

Ms. Caneda: Ignore it.

Mr. Kulik: If I stand up and I rest and I put nothing in evidence, nothing, can you consider that? Would you consider it? It's a hypothetical question.

Ms. Caneda: I've known a case where the person was guilty and the jurors let that person go.

Mr. Kulik: You were a witness in the case?

Ms. Caneda: No.

Mr. Kulik: So the friend told you what happened?

Ms. Caneda: After the case, it was in the newspaper. It was a rape case.

Mr. Kulik: So based upon the newspaper and what your friend told you about the case, you thought a guilty man went free?

Ms. Caneda: Correct.

Mr. Kulik: Do you think it was a bad decision by the jury?

Ms. Caneda: No, but I know how he felt and how he suffered with it.

Mr. Kulik: Do you think in a case of this nature, given these experiences you have had, you could be completely, absolutely impartial, or do you think it is possible, since you don't know anything about the case, that you might not be able to tell?

Ms. Caneda: I would take great responsibility in that case to be absolutely convinced. I'd look at the evidence and make sure it's the right answer.

Mr. Kulik: My question is—I don't mean to cross examine you—I am not asking you what your view is or do you think given the nature of the charges—it is a horrible charge. It is disgusting. And you felt that was wrong what happened, didn't you? You felt it was a miscarriage of justice?

Ms. Caneda: Right.

Mr. Kulik: You'd like to get that person. Do you think it is possible that you are not the best possible juror for a case like this when you heard what the charges were? Is there something about your past experiences that would stop you from being fair and impartial? Do you think that is possible?

Ms. Caneda: I would consider the fact of what I have experienced, I would be more responsible in figuring out if that person really did or did not do it. I would not want it to be on my shoulders.

Mr. Kulik: You think or are you sure?

Ms. Caneda: I'm sure.

Mr. Kulik: You are saying you are sure you can be fair and impartial in this case?

Ms. Caneda: Yes.

Mr. Kulik: Let me ask you this: Let's say, when we are picking the jurors, among people who have no experiences, like you have, you think it was wrong?

Ms. Caneda: No, I knew that juror.

Mr. Kulik: You knew the person that was the juror and the juror let the person go?

Ms. Caneda: They found out he had been arrested nine other times for the same crime.

Mr. Kulik: Do you think that experience would effect [sic] the way you deliberated on a case like this?

Ms. Caneda: I would think about it more and be more responsible for my answer and how I feel to be sure.

Mr. Kulik: Are you saying a case where I present no evidence and Charlie doesn't testify, are you saying the thought would not enter your mind?

Ms. Caneda: I'd say the prosecuting attorney better do a good job.

Mr. Kulik: The defendant in a case where there are such bad things said about him that you wanted to hate him, are you saying that thought would never enter your mind, or would it?

Ms. Caneda: I don't think so. I am suppose[d] to look to see the person innocent until proven guilty. I want to be objective about it.

[T.R. at 94-98.]

On this record, the trial court did not err in refusing a for-cause challenge with respect to Caneda. In context, Caneda's singular statement quoted by Petitioner simply reflects the natural human inclination to want to hear "both sides of the story" before rendering judgment. In fact, after making the statement, Caneda acknowledged that she understood that the

defendant did not have to present any evidence and that the guilt or innocence determination had nothing to do with whether or not the defendant testified.

Williams nonetheless contends that Caneda's later responses are immaterial because, under Florida law, after making an initial statement that she would require the defendant to present some evidence, the juror was incapable of rehabilitation. [*See* Tr. of Oral Arg. at 10-14.] The undersigned disagrees for two reasons. First, Petitioner's underlying premise that the statement at issue unequivocally demonstrates that Caneda would require the defendant to present evidence is flawed. Second, Florida law governing the rehabilitation of a prospective juror who, like Caneda, expressed a desire to hear evidence from the defense, is not as rigid as Petitioner asserts.

The year before Williams' direct appeal was decided, the Florida Supreme Court in *Van Poyck v. Singletary*, 715 So.2d 930 (Fla. 1998), considered a *Trotter*-based claim almost identical to the claim asserted here. The defendant had filed a petition for writ of habeas corpus arguing, *inter alia*, that his appellate counsel had rendered ineffective assistance for "failing to properly raise the issue of the trial court's wrongfully forcing him to exhaust his peremptory challenges"on "venirepersons who should have been dismissed for cause." *Id.* at 931. One particular potential juror, Mr. Aldridge was challenged based on the following colloquy during voir dire:

> MR. KLEIN [Defense Counsel]: Mr. Aldridge, as a result of what you have read [in the newspapers], have you formed any opinion, at all, about this case or about Mr. Van Poyck?
>
> MR. ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the Defendant is guilty.
>
> MR. KLEIN: Okay. Based upon what you read, would you have, would you, **before you could bring back a**

verdict of not guilty, would you ask for evidence, would you ask for us as Defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: **Yes, certainly.**

MR. KLEIN: **Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the Defense to convince you that he was innocent in view of what you have beard?**

MR. ALDRIDGE: **Yes, in view of what I have read, yes.**

THE COURT: Mr. Aldridge, let me ask you something. If I instructed you that under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the State presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

MR. ALDRIDGE: I would hope that I could.

THE COURT: If I told you right now the ball is in your court, is Mr. Van Poyck guilty or not guilty, what would you say in light of what I just told you?

MR. ALDRIDGE: I would have to say not guilty.

THE COURT: Okay. Would you be able to follow that if you were a juror and not form an opinion or fixed in your mind a verdict until you have heard all the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

THE COURT: Also, under our system the Defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof

in a criminal case is on the State, not on the Defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

Id. at 937 (Anstead, J., concurring in part and dissenting in part) (emphasis added).

Despite the juror's unequivocal statement that he would "certainly" demand evidence from the defense and his ambiguous rehabilitative statement that he "hoped he could" render an unbiased verdict, the majority found that the trial court's refusal to strike him for cause was not error. *Id.* at 931-932 ("Based on our examination of the record, we find that the trial judge was clearly within his discretionary authority in denying the challenges for cause to the seven venirepersons now claimed by Van Poyck to have been biased or prejudiced.").

In *Waddell v. State*, 458 So.2d 1140 (Fla. 5th DCA 1984), the court considered whether the trial court erred in denying a challenge for cause of two prospective jurors based on the following voir dire colloquy:

MR. CORNELIUS [Defense Counsel]: The Defendant does not have to prove her innocence, she has to prove nothing. The State must prove her guilt beyond and to the exclusion of every reasonable doubt. The Constitution of the United States gives my client the right to take the stand or not take the stand. Would any of you hold it against her if she elected not to take the stand?

THE VENIRE: No.

MR. CORNELIUS: Would any of you think she must be hiding something or—

A JUROR: **I might find it hard to accept, I would wonder why not.**

MR. CORNELIUS: All right, sir. Thank you for that candor.

A JUROR: I go along with this gentleman.

A JUROR: **I might have doubts if she refused to take the stand. My thinking might be a little hesitant.**

A JUROR: **If I was accused of something I would want to take the stand in my own defense.**

MR. CORNELIUS: All right. You're Mr. Matthews?

A JUROR: Correct. **If I was innocent I would want everybody to know it, I'd get up there and tell them about it.**

MR. CORNELIUS: Thank you, Mr. Matthews, we appreciate your candor. That's the same thing you feel?

A JUROR: Not me, I don't think so.

A JUROR: I do.

MR. CORNELIUS: You do?

A JUROR: I go along with that also.

MR. CORNELIUS: That's [sic] your feelings?

A JUROR: Yes, sir.

MR. CORNELIUS: **If persons don't take the stand they must be hiding something?**

A JUROR: **Well, presumably, I would think so.**

MR. CORNELIUS: All right, sir. Let me ask all of you this collective question. If the State fails to prove its case beyond and to the exclusion of every reasonable doubt would all of you agree with me that your verdict must be not guilty?

> THE VENIRE: Yes.
>
> MR. CORNELIUS: Would all of you agree with me that if you had to go in and render a decision right now that your verdict would have to be not guilty?
>
> THE VENIRE: Absolutely.

Id. at 1141 (emphasis added). In rejecting the defendant's claim that the trial court improperly denied her cause challenge with respect to the quoted jurors, the court reasoned that "[t]he fact that an uninstructed juror would expect an innocent defendant to positively assert his innocence cannot come as a surprise to anyone. If all such jurors were summarily excluded, it is doubtful jury trials could be held at all." *Id.* at 1142.

Similarly, in *Cason v. State*, 760 So.2d 283 (Fla. 4th DCA 2000), the court was faced with a challenge to the voir dire statements of a prospective juror. According to the court, the prospective juror said:

> that she did not understand and agree with defense counsel's comment that if the defense "decided to sit here and not do anything" during the trial, then she could not hold that against the defendant. [The prospective juror] . . . also responded affirmatively when the jury panel was asked if they would like to hear testimony from the defendant.

Id. at 283. Despite the fact that the defendant had not properly preserved the issue for appeal, the court reached the merits of the claim and held that the trial court did not abuse its discretion in denying a challenge for cause. *Id.* at 285.

In the cases where Florida courts have found error in a trial court's refusal to strike a juror for cause based on burden of proof concerns, the prospective juror's statements were substantially more objectionable than Caneda's isolated remark. *See Gibson v. State*, 534 So.2d 1231, 1232 (Fla. 3d DCA

1988) (potential juror stated "I feel if they are innocent, they can tell their side of the story to the judge."); *Hamilton v. State*, 547 So.2d 630, 632 (Fla.1989) ("juror stated she had a preconceived opinion of Hamilton's guilt and that it would take evidence put forth by Hamilton to convince her he was not guilty. . . . Even after the juror responded affirmatively to questioning by the trial judge regarding whether she could hear the case with an open mind, she again asserted that she had a fixed opinion as to guilt or innocence."); *Diaz v. State*, 608 So.2d 888, 889 (Fla. 3d DCA 1992) (juror failed to retract or modify her views that defendant was required to present at least some evidence at trial to prove that he was innocent); *Lowe v. State*, 718 So.2d 920, 921 (Fla. 4th DCA 1998) (juror "stated several times that the defense would have to refute the charges; that this is the only way he would find appellant not guilty; and that he would 'definitely' find her guilty if the defense failed to meet this burden . . . [he also] professed confidence that the state would present a sufficient case of guilt—e.g., 'I don't think the State would come to this point right now unless they had a case to present"); *Kramer v. State*, 747 So.2d 1046, 1047 (Fla. 4th DCA 2000) (juror stated to defense counsel "I would hope you could present something for your side." When asked whether "it would be sufficient for him to put on no evidence and to just argue that the state had not proved its case, or would he need more?" The juror replied "I would want to see more."); *Overton*, 801 So.2d at 891-892 (prospective juror repeatedly "admitted during voir dire that he has 'always believed' that 'when someone doesn't take the stand . . . they've got something to hide.'").

Thus, even if Williams' counsel had properly raised the issue, there is no reasonable probability that the Fourth District Court of Appeal would have found error in the trial

court's refusal to strike Caneda for cause.[17] Accordingly, Petitioner is unable to demonstrate prejudice from his appellate counsel's failure to raise a *Trotter* claim with respect to prospective juror Caneda.

CONCLUSION

After an exhaustive review, Mr. Williams has failed to establish that he is in the custody of the State of Florida in violation of the Constitution or laws or treaties of the United States. For all the reasons set forth above, it is **ORDERED AND ADJUDGED** that Magistrate Judge Bandstra's April 25, 2005 Report and Recommendation **[D.E. 15]** is **AFFIRMED AND ADOPTED**, consistent with this Order. Mr. William's Petition for Writ of Habeas Corpus **[D.E. 1]** is **DENIED**, and the Clerk of the Court is instructed to **CLOSE** the case.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of November, 2005.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Magistrate Judge Ted E. Bandstra
Counsel of record

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[17] In fact, Caneda's allegedly disqualifying statement pales in comparison to the statements of the two prospective jurors who were actually considered on appeal. *See Williams*, 755 So. 2d at 715 ("Mr. Hansen stated, in broken sentences, that he had experiences with this type of crime, and that his experiences could cause him to have 'flashbacks' that would taint his thought process. He stated that there needed to be evidence to prove the crime did *not* happen [and that it wasn't fair that Williams didn't have to testify and the jury can't hold it against the defense]. Ms. Van Hyning stated she 'would hope' to be fair, and commented, 'If [Williams] is innocent, why don't you get up and say so?'").

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-60356-CIV-ALTONAGA/BANDSTRA

CHARLES WILLIAMS,

Petitioner,

v.

JAMES V. CROSBY, JR.,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on Charles Williams' Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (D.E.1) filed on March 22, 2004. On March *26,* 2004, this petition was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Cecilia M. Altonaga, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Having carefully considered the petition, the response thereto, the underlying criminal court file and applicable law, the undersigned respectfully recommends that this Petition for Writ of Habeas Corpus be DENIED for the reasons explained below.

BACKGROUND

In December 1996, petitioner was charged by Amended Information in the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida, with one count of sexual battery upon a child; six counts of sexual battery committed by one in a position of familial or custodial authority; and six counts of indecent assault. On March 27, 1998, a jury found petitioner guilty on all counts. On May 1, 1998, petitioner was sentenced to life imprisonment without parole on Count I

and fifty. (50) years imprisonment consecutive to Count I on Counts II-XIII, running concurrently with each other. On direct appeal, the Fourth District Court of Appeal affirmed petitioner's convictions and sentence. *Williams v. State*, 755 So. 2d 714 (Fla. 4th DCA 1999).

On June 26, 2000, petitioner filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on a variety of grounds. On April 16, 2002, after two hearings, the trial court denied petitioner's Rule 3.850 motion, but corrected his sentence on Count I in accordance with its ruling in open court.[1] Petitioner appealed the circuit court's denial of his Rule 3.850 motion to the Fourth District Court of Appeal which issued *a per curiam* affirmance of the denial of the Rule 3.850 motion. *Williams v. State*, 861 So. 2d 48 (Fla. 4th DCA 2003).

In August, 2001, petitioner filed a petition for writ of habeas corpus in the Fourth District Court of Appeal alleging that he received ineffective assistance of counsel on direct appeal of his conviction when his counsel failed to raise a *Trotter*[2] violation, which had been properly preserved. The Fourth District Court of Appeal denied the petition without opinion.

On March 22, 2004, petitioner filed the instant petition for habeas corpus relief seeking either a new trial or release from imprisonment on the ground that he was deprived of his Sixth Amendment right to effective assistance of counsel. Petitioner challenges trial counsel's assistance in twelve respects. Specifically, petitioner claims that his counsel was ineffective for failing to specifically object to and move for a mistrial on the

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[1] Specifically, petitioner's sentence on Count I was corrected to read life imprisonment without eligibility for parole until twenty-five (25) years have passed.

[2] *Trotter v. State*, 576 So. 2d 691 (Fla. 1990) (trial court refused to excuse four prospective jurors for cause).

remarks about facts not in evidence made by the prosecutor during his opening statement and for failing to object to a *Williams* rule violation.[3] During his opening statement, the prosecutor explained the charges against the petitioner. After setting forth the charges, he stated, "[t]hirteen counts. You may ask yourself if it happened 100 times, why didn't you charge him 100 times? But that's what he is charged with. That's what you have to decide at the end of this trial" (T.R. 151).

After reading the prosecutor's opening statement in its entirety, the undersigned finds that trial counsel's decision to not object to the prosecutor's statement was a strategic one. Tactical or strategic decisions of counsel are not subject to attack, even where the tactical decision demonstrates bad judgment. *Id.* Additionally, the Florida Supreme Court and the Eleventh Circuit Court of Appeals have acknowledged that a decision not to object is a tactical one. *Ferguson v. State*, 593 So. 2d 508, 511 (Fla. 1992); *Devier v. Zant*, 3 F.3d 1445, 1454 (11th Cir. 1993) ("the decision not to object was based on a reasonable strategic choice. The fact that such a stratagem, viewed from hindsight, may have been imprudent does not, however, provide the basis for a claim of ineffective assistance of counsel").

In the instant case, the record reflects that trial counsel did, in fact, object several times throughout the victim's testimony that the abuse occurred more often than she could count or

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[3] Petitioner states that the prosecutor's statements to the jury – that the victim could not count the number of time she was molested and that the molestation started at age nine when the information charged that it began at age eleven—violated Williams rule. Petitioner argues that he received ineffective assistance of counsel when trial counsel failed to object to those statements, and that while those uncharged acts should not have been admitted at all, if those acts were to be admitted, they should have been brought in under Fla. Stat. § 90.404(2)(b)(1), ten days in advance of trial, and with a limiting instruction.

State's repeated presentation of other crimes evidence; failing to object to the *Williams* rule violation; failing to object to the prosecutor's improper vouching or bolstering of testifying police officers' credibility during closing argument; falling to seek redaction of petitioner's post-*Miranda* statement; failing to ensure that *voir dire* of potential jurors was conducted under oath; failing to properly perform at a preliminary hearing; failing to impeach the victim witness and/or arguing such impeachment during closing argument; failing to move for judgment of acquittal; failing to request a specific jury instruction; failing to present testimony of a medical expert; failing to file certain motions; and failing to raise on appeal trial court's error in retaining a prospective juror.

In response, respondent argues that petitioner's first two claims do not satisfy the two-prong test set forth in *Strickland v. Washington, infra*, and that his remaining ten claims are barred either because they were not raised on appeal of the trial court's denial of the Rule 3.850 motion or there is no basis for federal review.

ANALYSIS

To prevail on an ineffective assistance of counsel claim, a petitioner must first prove that his attorney's performance was deficient, falling below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* If either the performance or prejudice prong of the test is not satisfied, the claim must fail. *Id.* at 697.

A. Trial counsel's failure to object to improper prosecutorial remarks about facts not in evidence and failure to object to a Williams rule violation.

In his first two claims, petitioner argues that trial counsel was ineffective for failing to object to improper, prejudicial

put a number on (T.R. 232-239). As such, there is nothing to suggest that trial counsel's failure to make an objection during the prosecutor's opening statements was anything but a strategic decision. Moreover, the undersigned finds that the prosecutor's statements simply provided the jury with a summary of what they would hear during trial. Stating that the abuse occurred about a hundred times during the prosecutor's opening statement was not a presentation of uncharged crimes but rather a figurative statement concerning the extent to which the abuse occurred.[4] Further, the undersigned finds that the prosecutor's statements were not severely inflammatory given that, throughout eight pages of the trial record, the victim testified that the abuse occurred more than once, that she could not begin to count the number of times, that she could not put a number to all of the things, and that she had lost count of the number of times (T.R. 232-239).

Accordingly, the undersigned finds that the prosecutor's statements were not so inflammatory so as to render trial counsel's decision not to object deficient performance. *See Ferguson*, 593 So. 2d 508 (Fla. 1992) (although the Florida Supreme Court commented that the prosecutor's comments in his closing argument were objectionable, the prosecutor did not dwell on the comments nor were they so severely inflammatory or damaging as to render counsel's silence deficient performance.)

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[4] The undersigned notes that the prosecutor did not tell the jury that the victim could not count the number of times she was molested nor did he state that the molestation started at age nine (T.R. 232-239). During direct examination, the victim testified that she could not count the number of times she was molested and that she believed it started around the time that she was nine years old (T.R. 232-239).

B. Trial counsel's failure to object to prosecutorial misconduct during closing argument and failure to seek redaction of petitioner's post-Miranda statement.

With regard to petitioner's third and fourth claims of ineffective assistance of counsel, the undersigned agrees with respondent that these claims are procedurally barred. On direct appeal, the Fourth District Court of Appeal considered petitioner's arguments that the prosecutor improperly asked the jury to use the "who was lying" test to decide petitioner's guilt; that the prosecutor improperly vouched or bolstered the credibility of the police officers during closing argument; and that trial counsel failed to seek redaction of petitioner' statement "I don't want to incriminate myself". *Williams v. State*, 755 So. 2d 714 (Fla. 4~h DCA 1999). The appellate court found petitioner's arguments unpersuasive and affirmed the trial court's decision. Petitioner then re-litigated each of these claims in his Rule 3.850 motion as ineffective assistance of counsel claims, which the trial court subsequently denied as being procedurally barred. On appeal of the trial court's decision, the appellate court issued a *per curiam* affirmance.

Claims which were raised and rejected on direct appeal cannot be relitigated on a Rule 3.850 motion, "even if couched in ineffective assistance language." *Asay v. State*, 769 So. 2d 974, 989 (Fla, 2000). Moreover, a state procedural default bars consideration of an issue on federal habeas corpus review when (1) the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar, or (2) there is a clear and unambiguous application of a bar by the trial court, followed by *a per curiam* affirmance on appeal. *See, Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038 (1989); *Ylst v. Nunnemaker*, 111 S.Ct. 2590, 2594 (1991); *Harmon v. Barton*, 894 F.2d 1268 (11th Cir. 1990).

In this case, when petitioner attempted to re-litigate the above arguments as ineffective assistance of counsel claims, the trial court clearly and unambiguously applied a procedural bar to those claims. With regard to the claim that the prosecutor improperly asked the jury to determine who was lying as the test for deciding petitioner's guilt and the claim that the prosecutor improperly vouched or bolstered the credibility of the police officer testimony during closing argument, the trial court found that because those arguments were raised and rejected on direct appeal, they could not be relitigated in a Rule 3.850 motion. (Appendix, Exhibit 6, page 17). In regards to the claim that trial counsel failed to seek redaction of petitioner's statement, the trial court found that it, too, was procedurally barred because it was raised on direct appeal and rejected by the appellate court.[5] (Appendix, Exhibit 6, page 18).

Since the trial court expressly found that the aforementioned claims were barred on procedural grounds and that result was affirmed without opinion by the Fourth District, these claims are barred from further review by this Court as they raise substantially the same issues.

C. Trial counsel's failure to ensure that *voir dire* of potential jurors was conducted under oath.

Petitioner's fifth claim of ineffective assistance of counsel is based on trial counsel's alleged failure to ensure that *voir dire* of the jury panel was conducted under oath as required by Fla. R. Crim. P. 3.300(a). Petitioner raised this claim in his

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[5] On appeal of the trial court's order denying the Rule 3.850 motion for post-conviction relief, the Fourth District issued a *per curiam* affirmance without opinion. *Williams v. State*, 861 So. 2d 48 (Fla. 4th DCA 2003). *See, e.g., Harmon v. Barton*, 894 F.2d 1268, 1274 (11th Cir. 1990) (court's *per curiam* affirmance of the trial court's ruling explicitly based on procedural default is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts).

Rule 3.850 motion as well as on appeal of the trial court's denial of his motion for post-conviction relief, and in both instances, the claim was rejected. The undersigned finds that there is no constitutional issue involved in this claim as it deals solely with the trial court's error to follow a state rule of criminal procedure. "A state's interpretation of its own laws or rule is no basis for federal habeas corpus relief since no question of constitutional nature is involved." *Bronstein v. Wainwright*, 656 F.2d 1048 (5th Cir. 1981).

Even if this Court were to address the merits of this claim, petitioner fails to establish the requisite burden for federal habeas corpus relief. Trial counsel's failure to object to the empaneling of an unsworn venire does not rise to the level of deficient performance as required by *Strickland*, nor did it deprive petitioner of a fair trial. To establish deficient performance under Strickland's first prong, the defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland.*, 466 U.S. at 687. Under the Sixth Amendment, criminal defendants are not entitled to error-free representation but rather representation that falls "within the range of competence demanded of criminal cases and [that] conform[s] to professional standards of reasonable investigation of facts and understanding of the law." *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989).

Moreover, to establish prejudice under the second prong, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Notwithstanding the fact that prospective jurors were not sworn prior to *voir dire*, the members of the jury who actually heard petitioner's case were properly sworn. No evidence has been presented to suggest that this prejudiced the petitioner in any way.

D. Trial counsel's failure to perform properly at a preliminary hearing, impeach the victim witness, move for judgment of acquittal, request a specific jury instruction, present testimony of a medical expert and file certain motions.

In addressing claims six, seven, eight, nine, ten, and eleven—trial counsel's performance at a preliminary hearing; his alleged failure to impeach the victim and argue such impeachment during closing; his alleged failure to move for judgment of acquittal; failure to request a specific jury instruction; failure to present testimony of a medical expert; and failure to file a motion to dismiss, motion for judgment of acquittal, or motion attacking the verdicts on Count VII and Count iX—the undersigned notes that it is well settled that a writ of habeas corpus should not be granted unless it appears that the applicant has exhausted the remedies available to him in the state courts. 28 U.S.C. § 2254(b). After fully reviewing the pleadings, all exhibits attached thereto, and the record of state court proceedings, the undersigned finds that the denial of the above addressed claims was not raised on appeal of the trial court's denial .of the Rule 3.850 motion.

Issues raised in a federal petition for habeas corpus must have been fairly presented in the state courts and thereby exhausted. *Anderson v. Harless*, 459 U.S. 4 (1982). Since these claims were not expressly raised on appeal, they have not been fully exhausted by state remedies. When petitioner appealed the trial court's denial of his Rule 3.850 motion, he raised numerous issues including unsworn *voir dire*, failure to object to prosecutor's "uncharged crimes" comment, failure to object to prosecutorial misconduct during summation and failure to redact portions of petitioner's post-*Miranda* statement to the police. Petitioner also included a sub-heading entitled "Other Issues Not Argued Here Are Preserved" wherein he stated that there were additional errors and omissions that tainted some of the counts, but did not specifically

articulate the content or subject matter of those additional errors and omissions.

Respondent argues that because petitioner did not expressly set forth the above referenced claims in his appellate brief, the petitioner failed to exhaust those claims for purposes of federal habeas review. The petitioner responds by pointing out that the Summary of Argument section in his initial appellate brief noted that those claims were incorporated by reference from Defendant's Proposed Order Granting Postconviction Relief. While petitioner contends that "[i]ncorporation by reference is a well established legal technique of presenting information without needless repetition", he fails to cite any case law which supports that statement. The undersigned notes that petitioner's tactic of referring to his Proposed Order Granting Postconviction Relief was not sufficient to constitute presentation of the claims for appellate review and as such, those claims were not reviewed by the appellate court. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). Moreover, for an issue to be raised, it must be explicitly stated and argued in the brief. Fla. R. App. P. 9.210(b)(1), (5). *See, Singer v. Borbua*, 497 So. 2d 279, 281 (Fla. 3rd DCA 1986). (in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal.) Because petitioner failed to seek appellate review of the trial court's denial of these specific claims, the undersigned finds that they are unexhausted claims and cannot be considered by this Court.

The exhaustion requirement is grounded on principles of comity and enables state and federal courts to avoid collateral proceedings. This requirement also protects the state court's role in the enforcement of federal law. *Rose v. Lundy*, 455

U.S. 509, 102 S. Ct. 1198 (1982). "['l']he rule in this circuit is that a federal district court generally must dismiss, without prejudice, a state prisoner's petition for a writ of habeas corpus that contains a mixture of exhausted and unexhausted claims." *Galitieri v. Wainwright*, 582, F.2d 348, 351 (11th Cir. 1978).

E. Trial counsel's failure to raise trial court's error in retaining a prospective juror on appeal.

Lastly, petitioner claims that he received ineffective assistance of counsel when, on appeal, trial counsel failed to specifically raise the trial court's error in retaining a prospective juror (Nancy Caneda).[6] On direct appeal, in addition to other various points, petitioner's counsel argued that the trial court erred in not allowing petitioner to strike, for cause, nine prospective jurors who gave various disqualifying responses to inquiries regarding their ability to be fair and impartial.[7] However, petitioner contends that because counsel did not specifically raise the prospective juror's burden of proof bias, the court could not address it, thereby prejudicing the outcome.

In its decision, the Fourth District Court of Appeal expressly addressed burden of proof bias with respect to other prospective jurors. Though petitioner contends that the court

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[6] While petitioner's Rule 3.850 motion was pending, he filed a writ of habeas corpus in the Fourth District Court of Appeal alleging this same claim. In denying petitioner's motion for certification and alternative motion to issue opinion explaining denial of petition for writ of habeas corpus to permit Supreme Court review, the court stated that "the issue of the court's error in failing to grant challenge for cause on the jurors was raised in the initial appeal . . . . [t]his included juror Canella, [sic] as the court was asked to review all the jurors challenged for cause." (Exhibit 3 - Petition for Writ of Habeas Corpurs, Fourth District Court of Appeals).

[7] In the Statement of the Case and Facts section of his brief, petitioner's counsel specifically named the nine prospective jurors, including Nancy Caneda. (Exhibit 2—Initial Brief).

did not specifically consider the issue of Nancy Caneda's burden of proof bias, the court did, in fact, address the denial of all nine challenges for cause. *Id.* at 716. The Court explained that "[Hansen and Van Hyning] should have been stricken for cause. [But] [n]o error is presented, however, in the trial court's denial of the other seven challenges for cause." *Id.*

Reviewing petitioner's appellate brief, the undersigned finds that although counsel did not specifically articulate prospective juror Nancy Caneda's burden of proof bias, he did address her as one of the nine prospective jurors that should have been stricken. As such, the undersigned agrees with the Fourth District Court of Appeal's finding that although it was error to deny petitioner's cause challenges as to two of the nine jurors, there was no reversible error since the trial judge granted petitioner's request for two additional peremptory challenges. *Williams*, 755 So. 2d at 715.

Moreover, even if Nancy Caneda's burden of proof bias would have been specifically raised on appeal, it is unlikely that a reversal would have been warranted. "It is reversible error for a court to force a party to use peremptory challenges on person who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied." *Hill v. State*, 477 So. 2d 553, 556 (1985). In this case, petitioner was granted two additional strikes after he exhausted all of his peremptory challenges. By using the additional peremptory challenges granted by the court to strike those jurors, petitioner failed to show prejudice which warranted a reversal. *Williams*, 755 So. 2d at 717. Accordingly, the undersigned finds that the rejection of the ineffective assistance of counsel claim by the Fourth District Court of Appeal was not an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2).

RECOMMENDATION

In summary, petitioner has failed to prove that his trial counsel's particular acts and omissions were outside the wide range of professionally competent assistance. As such, the undersigned finds no basis to conclude that petitioner's trial counsel provided ineffective assistance of counsel. Moreover, the remainder of petitioner's claims are barred by procedural default or are unexhausted claims.

Accordingly, the undersigned recommends that this Petition for Writ of Habeas Corpus be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Cecilia M. Altonaga, United States District Judge, within ten (10) days of the receipt. See 28 U.S.C. § 636 (b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied* 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5t" Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED this 22nd day of April, 2005, in Miami, Florida.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:

Honorable Cecilia M. Altonaga
Steven Wisotsky, Esq.
Richard Valuntas, Assistant Attorney General